

1986

# State of Utah v. Eddie Michael Underwood: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH,           | : | <u>860044</u>   |
| Plaintiff/Respondent,    | : | Case No. 860044 |
| vs.                      | : |                 |
| EDDIE MICHAEL UNDERWOOD, | : |                 |
| Defendant/Appellant.     | : |                 |

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BRIEF OF APPELLANT

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An appeal from a plea of guilty by Appellant, in  
the Second Judicial District Court, County of Weber,  
State of Utah, the Honorable Ronald O. Hyde presiding.

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**FILED**  
FEB 12 1987

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*Clerk Supreme Court Utah*

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff/Respondent, : Case No. 860044  
vs. :  
EDDIE MICHAEL UNDERWOOD, :  
Defendant/Appellant. :

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BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The evidence is insufficient to sustain a conviction against the Defendant of a Criminal Homicide, Murder in the Second Degree

STATEMENT OF THE CASE

This is a criminal action in which the Defendant was charged, pursuant to Section 76-5-203 of the Utah Code Annotated, 1953 (as amended), with Second Degree Murder. The matter came on for trial before the Honorable Ronald O. Hyde, sitting with a jury, on the 10th, 11th, 12th, 16th, 17th, and 18th day of December 1985. The jury convicted Defendant of Second Degree Murder, a First Degree Felony, and the Defendant was sentenced on the 20th day of December, 1985 to from five years to life in the Utah State Penitentiary. The Defendant appealed that conviction to this court on the 16th day of January 1986.

STATEMENT OF THE FACTS

On September 7, 1985, the Defendant, Eddie Michael Underwood, and his mother, Cleo Underwood, and his sister, Dolly Underwood were walking home from Liberty Park in Ogden (Tr. 897, 898). On the way home, the Defendant saw Leon Zerfas across the street

dencing a depraved indifference to human life, and therefore, that the Defendant had the requisite intent necessary to convict him of a Second Degree Homicide.

#### ARGUMENT

THE EVIDENCE, AS PRESENTED AT TRIAL, IS INSUFFICIENT TO PROVE THE DEFENDANT GUILTY BEYOND REASONABLE DOUBT OR CRIMINAL HOMICIDE MURDER IN THE SECOND DEGREE

Section 76-1-501 Utah Code Annotated, 1953 (as amended), places a burden of proof upon the State of beyond a reasonable doubt and in the absence of such proof, requires the Defendant be acquitted.

Counsel is mindful of this Court's rather strict standards of review when, in fact, the Court is asked to review the records to determine the sufficiency of a verdict. This view is expressed in State v. Newbold, 581 p.2d 991 (Utah 1972), where this Court held

"to set aside a jury verdict, evidence must appear so inconclusive and unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that the Defendant committed the crime." (Id. at 972)

In applying this standard of review to the present case, the jury was faced with a fact situation in which Leon Zerfas started an argument and an altercation with the Defendant during which he threatened and tried to harm the Defendant.

While it is true that the Defendant had pulled a knife out of his back pack in hopes that the sight of it would scare Zerfas away, the knife was not shown to Zerfas until after Zerfas had demonstrated his intentions to engage in a fight with the Defendant. The knife was not extracted from the Defendant's back pack until after Zerfas had caused substantial

(Tr. 897). Because the defendant had been informed that Zerfas was "out to get him" (Tr. 897) the Defendant started walking faster, attempting to avoid Zerfas (Tr. 899). The Defendant had previously been charged with sexually molesting Zerfas' sister (Tr. 896) which was probably why Zerfas was "out to get him". Zerfas ran after the Defendant shouting obscenities at him and attempting to engage the Defendant in a fight (Tr. 902, 904). At that time, the Defendant pulled a knife out of his back pack in an effort to scare Zerfas away (Tr. 902). Zerfas kept taunting the Defendant and attempting to engage him in a fist fight. Zerfas then found a large pipe on the ground and commenced trying to lunge at and hit the Defendant (Tr. 907 and 908). The Defendant grabbed the pipe on two different occasions to avoid being hit with the pipe by Zerfas (Tr. 907 and 908). Finally, the Defendant could no longer fend off Zerfas' attacks. For his own defense and because the Defendant felt he had no other alternative, he struck Zerfas with the knife (Tr. 908,909).

When the Police arrived, the Defendant told them he had stabbed Zerfas in self-defense (Tr. 221,951). At trial, a variety of witnesses testified regarding the fight between the Defendant and Zerfas. There was contradictory testimony in regards to whether or not the Defendant was put into the position of having to defend himself by stabbing Zerfas.

The jury found the Defendant guilty of second degree murder. From that conviction, the Defendant appeals.

#### SUMMARY OF THE ARGUMENT

The Defendant contends that the State failed to prove, beyond a reasonable doubt the Defendant acted under circumstances evi-

fear in the Defendant.

The law, as stated in §76-2-402 U.C.A. 1953, is clear on the issue of self defense. The code states as follows:

" . . . a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonable believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony."

In this case, several witnesses saw the events in question as they occurred. There is absolutely no contradicting evidence to the fact that the Defendant used the knife against Zerfas only after Zerfas had picked up a large pipe and wielded it as a weapon against the Defendant. Although some witnesses had the impression that the Defendant acts were excessive, the statute is clear that a person's acts are acts of self defense in two instances:

1) Where he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself, and

2) To prevent the commission of a forcible felony, i.e. aggravated assault and murder. Under either prong of this statute, the Defendant's acts were acts of self defense. In either case, the Defendant was justified in the use of such force. In his mind he had no other choice but to defend himself in such manner. Had he not so acted, there is a great probability that Zerfas would have committed a forcible felony against the Defendant, i.e. aggravated assault or murder.

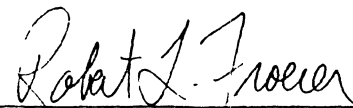
Therefore, the evidence shows that a person with a reasonable mind and acting fairly in response to the evidence must have entertained a reasonable doubt that the Defendant was acting

under circumstances evidencing a depraved indifference to human life as required in the case of State v. Newbold. The evidence is no more conclusive that the Defendant, Eddie Michael Underwood is guilty of Murder than it is that he acted in self defense. Therefore, a reasonable mind would be forced to have a reasonable doubt as to the Defendant's guilty.

CONCLUSION

Based upon the foregoing arguments and a thorough review of the evidence, the Defendant respectfully requests this Court to reverse his conviction.

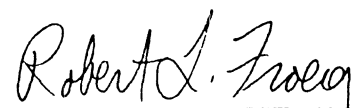
RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December 1986.

  
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ROBERT L. FROERER  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed 4 copies of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114.

DONE this 12<sup>th</sup> day of December 1986.

  
\_\_\_\_\_  
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